



Affiliated Tribes of Northwest Indians

Economic Development Corporation

May 14, 2006

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Office of Indian Energy and Economic Development
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Department of Energy
1000 Independence Ave, SW
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Dear Sirs,

Please allow this letter to serve as additional written comments of the Affiliated Tribes of Northwest Indians Economic Development Corporation (ATNI-EDC) on the Energy Policy Act of 2005's Section 1813 Study on Indian Rights of Ways. Our previously submitted written comments, as well as our presentations and remarks at the public meetings are incorporated herein by reference.

In addition to our earlier comments, ATNI-EDC would like to address three other topics. First, a set of Tribal Principles has been considered and adopted by numerous tribes and tribal organizations. Second, we will take the opportunity to respond to energy industry concerns regarding tribal rights of ways that have been expressed in the public meetings, various publications, and in industry comments. Third, we propose a number of recommendations which could be included in the report to Congress for your consideration.

Tribal Principles

The Departments of Energy and Interior are trustees of tribal resources, including tribal lands as they may be used for energy rights of ways. As trustees with decision making authorities over these precious tribal resources, the Departments of Energy and Interior owe a fiduciary duty to tribes *to act in the best interests of the tribes*. To assist our trustees in understanding the best interests of tribes, representatives from a number of

tribes drafted and finalized a set of Principles which should govern the considerations of the Departments of Energy and Interior. *We view a breach of these Principles as a breach of the federal trust responsibility and a breach of a number of Tribal Treaties that are described by various tribes that are parties to those treaties with the United States of America.* Those Principles are as follows:

INDIAN TRIBES – PARTNERS IN AMERICA’S ENERGY FUTURE

SECTION 1813 RIGHT-OF-WAY STUDY – TRIBAL PRINCIPLES

1. **Tribal Sovereignty and Consent.** The power of tribes to prevent third parties from using tribal lands without tribal consent is a critical element of tribal sovereignty that has been established in Federal law and policy for over 200 years. The tribal consent requirement to the use of tribal lands should be honored and preserved.
2. **Conditions to Consent.** The tribal consent requirement includes the power of tribes to place conditions on the use of tribal lands, including conditions related to tribal jurisdiction, preservation of environmental and cultural resources, duration of use, and compensation.
3. **No Negative Effects.** Adherence to the tribal consent requirement has resulted in greater energy production in Indian country and lower energy costs to consumers. The tribal consent requirement for rights-of-way has not had a noticeable negative effect on the availability or cost of energy to consumers.
4. **Preservation of Tribal Jurisdiction.** No right-of-way agreement or other business arrangement that permits third-party use of tribal land should reduce the sovereign power of a tribe over its lands or the activities conducted on its lands in the absence of the specific consent of the tribe.
5. **Restricted Duration of Rights-of-Way.** Federal law and policy should not be changed to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.
6. **Negotiated Compensation.** Tribes should continue to have the right to negotiate compensation for the use of tribal land that gives tribes a fair share of the economic benefits produced by use of their lands. Such revenues sustain tribal governments and cultures.
7. **National Security.** Indian nations are an integral component of energy security of the United States, not a threat to that security. History demonstrates that tribes have permitted critical energy facilities to be used pending compensation negotiations even in cases where tribal rights-of-way have expired.
8. **Industry Partnerships – Best Practices.** Federal law and policy should provide positive incentives to tribes and industry to foster partnerships and the mutual alignment of economic interests related to energy development, transmission and distribution.

9. **Appropriate Deference.** As reflected in the Indian Tribal Energy Development and Self Determination Act of 2005, deference to tribal decision-making should remain a fundamental component of Federal Indian energy policy.
10. **Allottee Experience.** The creation of a Federal administrative valuation process for fixing tribal right-of-way compensation would be an affront to tribal sovereignty and, as shown by the disastrous Federal management of Indian allottee resources, would be a mistake.

The Affiliated Tribes of Northwest Indians Economic Development endorses these principles.

Tribes across the country have these Principles on Tribal Council Agendas for their consideration. At the time of this writing, many tribes and organizations have approved these principles. Those tribes and organizations are as follows: (Hard copies of each Tribal or organizational decision document adopting these principles will be sent directly by each tribe and will be attached to the copy of these comments submitted by first class mail.)

- Colville Business Council (Vote 12-0)
- Confederated Tribes and Bands of the Yakama Nation (Vote 11-0)
- Shoshone-Bannock Tribes (Vote 6 in favor, 1 not voting)
- Quileute Tribal Council (Vote 4-0)
- Nez Perce Tribal Executive Committee (Comments signed by Chairman Rebecca Miles)
- Confederated Salish and Kootenai Tribes (Vote 9-0)
- Southern Ute Indian Tribe (Vote 3-0)
- Ute Indian Tribe of the Uintah and Ouray Reservation (Vote 6-0)
- Navajo Nation (Intergovernmental Relations Committee Vote 5-3)
- The Jicarilla Apache Nation (Vote 8-0)
- Ute Mountain Ute Tribal Council (Vote 5-0)
- Montana-Wyoming Tribal Leaders Council: Northern Cheyenne Tribe, Salish & Kootenai Tribes, Chippewa Cree Tribe, Arapaho Business Council, Ft. Belknap Indian Community Council, Ft. Peck Tribal Executive Board, Eastern Shoshone Tribe, Blackfeet Tribal Business Council, Crow Tribe, Little Shell Tribal Council,
- Rosebud Sioux Tribe (Vote 13-0)
- Morongo Band of Mission Indians (Hard copy unavailable at this time.)

In addition, the comments of the Cheyenne River Sioux Tribe adopt their own version of the Principles.

The Mni Sose Intertribal Water Rights Coalition, with 22 member tribes (including the Sprit Lake Sioux, Kickapoo Tribe in Kansas, Lower Brule Sioux Tribe, Omaha Tribe of Nebraska, Ponca Tribe of Nebraska, Prairie Band Potawatomi Nation, Sac & Fox Nation of Missouri, Santee Sioux Nation, Turtle Mountain Band of Chippewa Indians, Winnebago Tribe of Nebraska, Yankton Sioux Tribe, Flandreau Santee Sioux Tribe, Sisseton-

Wahpeton Oyate of the Lake Traverse Reservation), comment that they oppose any change to the current tribal right to consent to the use of tribal lands.

In addition to support for the Principles, many tribes, such as The Manzanita Band of Mission Indians, St. Regis Mohawk Tribe, and the Three Affiliated Tribes of Ft. Berthold have submitted comments that are consistent with the Principles, and add further details and information. Many tribes that have supported the Principles have also provided other comments that describe their treaty rights and which describe in detail other aspects of the 1813 study.

It is clear that to honor their trust responsibility, the Departments of Energy and Interior must make any recommendations to Congress consistent with these Principles and with tribal Treaties.

Energy Industry Concerns and Tribal Responses:

This study is being done after members of the energy industry expressed concerns over tribal right of way negotiations. Some of their concerns, and our responses, are described here.

1. Numerous existing Indian rights of way are expiring over the next 10-20 years creating a large scale negotiation process for energy companies.

Responses:

- This is an opportunity for Tribes and Industry to develop better working relationships
- In order to facilitate better working relationships, tribes with rights of ways could
 - Know which rights of ways will expire and when to expect discussions
 - Review those rights of ways for compliance with existing terms
 - Develop and obtain approvals for strategies for working with energy companies
 - Develop formal procedures for negotiations, including process, negotiating teams, compensation methodologies, negotiation fees, trespass rules, etc. and provide these procedures to energy companies
- Energy industry could do a better job explaining the context of each right of way negotiation and the facilities involved and create long term relationships with tribes.

2. Indian tribes can ask for “exorbitant prices” for their rights of ways because there is no right of eminent domain, or other process to enforce a “reasonable” settlement. Amounts being demanded bear no relation to market value or to fair compensation.

Responses:

- Each tribe and negotiation is different due to the tribal history, the history of the facilities on tribal lands, past compensation (if any), other dealings with particular companies, and the situation in question.
- For historical, legal, religious, and other reasons, Indian lands are different than non-Indian lands, so any comparison of Indian land values to non-Indian land values is an apples-to-oranges comparison and characterizations of that comparison are not useful.
- It is appropriate for sovereign Indian tribes to charge prices for rights of ways that are not based on appraised land values, since rights of ways across sovereign lands impact more than just the land but other aspects of tribal sovereignty and government, such as jurisdiction, culture, religions, treaties, etc.
- Tribes are encouraged, however, to consider adopting formal procedures for effectively concluding right of way negotiations.

3. Charges are passed on to consumers in the form of higher energy costs.

Responses:

- Of consumers' total energy bills: 6-19% of the bills are for transportation costs. 3-6% of transportation costs are for right of way acquisition. It is estimated that 1-4% of energy right of ways are on Indian lands.
- Using the average numbers, 2.5% of 4.5% of 12.5% = .01406% of the total consumer's energy bill. For a \$100/month bill this equals 1.4 cents.
- Consumers receive value for their 1.4 cents as they have the right to cross tribal lands, which were given *exclusively* to tribes in treaties and other legal government settlements. Charges over non-Indian land values are part of America's bargain with its Indian sovereigns.
- When compared with the consumers' share of energy industry profits and with energy industry executive compensation, and even with state and municipal energy tax rates, Indian land compensation is considerably smaller.

4. Indian tribes have in the past prohibited the use of their lands for critical energy facilities and have required the removal of existing facilities.

Responses:

- Tribes are good citizens and work to be good neighbors and patriots. Tribes do not have a history of unreasonably excluding energy rights of ways from their lands. Tribes have an incentive to bring energy industry facilities onto their lands so that their people obtain energy services.
- With thousands of rights of ways on Indian lands, only one instance has been cited in which a facility was removed after its right of way expired. In that case, the Yellowstone Pipe Line, a refined fuels (jet fuel) pipeline, which operated on tribal land, the Flathead Indian Reservation, from 1954-1995 leaked at more than twice the industry average and released more than 170,000 gallons of fuel onto the Flathead Indian Reservation lands and waters. At the time of renegotiation, two spill sites were unremediated and unrestored. Since termination of the right of way, the

pipeline's parent company, Conoco-Phillips, uses rail transport for its product across the reservation and has become directly involved in managing the abandoned pipeline and in clean up of the sites and in better environmental planning. The company now has a better relationship with the Tribe.

- One case has been cited in which a tribe reportedly blocked a new high voltage electrical facility. That is simply not the case. The example (cited by electric industry representatives in the recent meeting on this matter), involved the intervention of the Pechanga Tribe in SDG&E's Valley-Rainbow Project. The Tribe became involved because of its interest in protecting one of its sacred sites, the Great Oak, which was proximate to one of the proposed alternate routes for the line. The tribe purchased and took the land into trust in order to preserve this resource. However, the Tribe's intervention related to its interest in protecting the Great Oak, and was never commercially motivated (right-of-way terms were never negotiated with the utility). Moreover, the Tribe's actions were not the reason that the line was not approved. The line was strongly opposed by community groups who submitted substantial amounts of evidence concerning the lack of need for the line. The California Public Utilities Commission ("CPUC"), in Decision 02-12-066 (Rehearing Denied in Decision 03-06-030) refused to grant SDG&E's request for a Certificate of Public Convenience and Necessity ("CPCN") because it determined that SDG&E would continue to meet established reliability criteria in the relevant time period without the line. The CPUC further determined that the line could only be cost-effective to ratepayers under one set of "extreme" circumstances. At the meeting, the industry representatives further described SDG&E's current efforts to build the "Sunrise" line to add transmission serving the San Diego area. This constitutes an attempt to rebut the CPUC's determination that transmission was not required and an attempt to impute the alleged need for new transmission upon Pechanga's efforts to protect its sacred site. In response, it should be noted that the proposed Sunrise line is situated in a different location than the Rainbow-Valley line and is not being justified in the same timeframe (a relevant criteria for a CPCN) as the Rainbow-Valley Line. Even if the Sunrise line is required now, that would not change the fact that the CPUC (for reasons other than Pechanga's intervention) determined that the Rainbow-Valley Line was not needed.

5. Indian tribes want a share of energy facility income rather than a compensatory value for land.

Responses:

- Indian Tribes have historically been "colonized" by energy companies; meaning that energy companies have a history of entering Indian reservations, often with federal government support, to use Indian natural resources such as coal, oil, gas, water, land, and air for great profits while paying the tribes a small passive royalty percentage of the value of the

resources. Indian reservations remained impoverished and many continue to lack basic modern services such as electricity, natural gas, clean water, and transportation. At the same time, the environment on reservations was irreversibly changed or polluted to the detriment of Indian populations.

- Indian tribes as sovereign governments are now seeking to change the paradigm of their relationships with energy companies, and to become full partners in the use of their resources. Land is one of those resources and as such, tribes do prefer to use their land resources to become part of energy development rather than a victim of energy development.

6. Indian tribes are difficult to work with when negotiating rights of ways, with discussions taking many years and tribes not returning calls and not replying to energy industry proposals and requests.

Response:

- Both Indian tribes and energy industry personnel can both do a better job when it comes to working with each other for mutually beneficial projects. Industry can become better educated in understanding how to deal with tribes. Tribes can create better internal infrastructure and formal procedures to be better able to respond to and be a part of industry.

7. The lack of an Indian tribal right of way negotiation process, short terms for rights of ways and unreasonable compensation requests creates a lack of stability and predictability necessary for the regulatory and planning needs of utilities that are bound by state regulatory processes and federal rate making processes.

Response:

- Indian Tribes can exercise their sovereignty in response to this concern and can, as set forth above, create better internal infrastructure and formal procedures to be better able to respond to and be a part of industry. Tribes must listen to their partners' concerns if they expect to be good partners in the future.
- Industry can do a better job of educating leaders and tribal staff regarding their needs and the needs of the energy industry. Industry can assist tribes with which they work in establishing energy offices and energy expertise.

8. There is nothing to suggest that tribes were historically compensated less than non-tribal landowners.

Response:

- The comparison between tribal compensation and non-tribal compensation is not appropriate. Tribes, as sovereign entities, with lands subject to a very different legal status, are not appropriately compared to non-tribal lands.
- Many examples of tribes being under-compensated are available. See "Site Visit Report of the Special Master to the Office of Appraisal

Services in Gallup New Mexico and the Bureau of Indian Affairs Navajo Realty Office in Window Rock Arizona¹”.

- Many tribal comments in this process will describe long term rights of way negotiated by the Bureau of Indian Affairs without tribal involvement for long (50 year or perpetual) tenures for prices that do not reflect the unique nature of tribal lands or the requirements of tribal treaties.

9. There are problems appraising Indian lands under the standards set by the International Right of Way Association.

Response:

- Standards set by the International Right of Way Association should not be applicable to tribal lands, since a non-tribal association is not an appropriate body to value tribal lands.

10. “Legislation is the only sure way to end the current practice that allows tribes to demand whatever they want for rights of way with no recourse for utilities and pipeline companies except to pay or forego supplying oil, gas, electricity and other products the public needs.”

Responses:

- Legislation is only appropriate if tribes and industry together come to consensus that the laws should be changed.
- Other avenues of discussion which can identify issues and seek to resolve them, and to educate all parties about the issues will be more effective than legislation and the likely resulting litigation and other conflict.

11. As more tribes began amassing huge profits from casino gambling, they have become much more assertive in demanding compensation for grants of right of way.

Response:

- There is no connection between gambling businesses and energy rights of way. Tribes without gaming are also involved with right of way issues.

12. There is a distinction between a grant of a right of way and a renewal of an existing right of way.

Responses:

- Most renewals of rights of ways that are coming due in the near future are renewals of 50 year rights. After 50 years, (or even 20 years in many cases) the facilities are likely fully depreciated and a source of energy industry profits. Negotiation of new rights to use these facilities is appropriate.
- These rights of way agreements are contracts and energy companies must live with their expiration, just like the expiration of any other contract. Most of the contracts were entered into without tribal participation, and with poor representation of tribal interests by the federal government,

¹ A copy of the report is available at http://www.indiantrust.com/_pdfs/navajo1.pdf

therefore these original contracts were quite likely in favor of energy company interests.

- Contracts can be improved in the future to establish clear and agreeable procedures to be followed when rights of way expire.

13. Tribes use their newfound gambling wealth to purchase additional land and have it conveyed to the federal government to become tribal land. A pipeline company considering building around a reservation as an alternative to paying an excessive demand may find the build around route blocked by such an expansion of tribal land.

Response:

- Putting land into trust status is a difficult and multi-year process with many layers of local and federal review that would prohibit a tribe from seeking to prevent a reroute of facilities.
- Tribes are not interested in blocking facilities or in any way in impairing energy delivery.

14. For new facilities, energy companies report that they seek to avoid tribal lands for energy facilities, often to the detriment of the tribes.

Response:

- While this may be appropriate in some cases in which a tribe is not willing to consider energy facilities, energy companies are encouraged to attempt to work with the tribe prior to making these decisions and tribes are encouraged to work openly with energy companies.

15. Energy companies want predictable, equitable, efficient and transparent processes for acquiring land rights from Indian Tribes.

Responses:

- As part of any land acquisition, and as part of doing business on any tribal lands, energy companies should get to know each tribe with which it is doing business on an individual basis, and should work with the tribal leadership to learn tribal history and culture, land use requirements, customs, and personnel. Energy companies and tribal leadership can establish practices or even tribal laws which give energy companies the predictability and transparent processes they seek.
- Tribes should be cooperative with energy companies to accomplish good working relationships and future partnerships. Tribes can institute and publish rules, regulations, and procedures for land negotiations. They can also charge reasonable negotiation fees so that they can afford to hire or develop expertise needed to effectively negotiate rights of ways.
- Tribes are served by many utility companies and many energy companies use resources that come from tribal lands. Utilities that are making money from tribal customers, or use tribal resources should take special care to create and maintain relationships with those tribes.

Proposed Recommendations

Throughout this process, a number of issues have arisen through tribal and industry discussions that could be used to improve the right of way negotiation process for all parties concerned. Many of these suggestions can be instituted by the Departments of Energy and Interior. Many others can be instituted by tribes or energy industry members. It is clear, however, that to be good business partners and achieve cooperative working relationships, all parties must change their mind-sets and come to the negotiation tables with good faith and open minds. Our suggested recommendations follow:

- A. Tribes should be encouraged to take an active role to manage their realty offices and records in a single site with back up computer files, whether through 638 Contracts with the Department of Interior, through partnerships with energy industry, new regulations now being drafted regarding the Tribal Energy Resource Agreements, or through direct funding of land records offices. Modern computerized and GPS supported mapping should be in place, as well as improved land ownership records.
- B. For tribes who continue to be supported by the Bureau of Indian Affairs Realty staff, improved and modernized systems should be created for tribal realty and land ownership records and all records should be kept in a single site, with backup computer files. Modern computerized and GPS supported mapping should be in place for every reservation.
- C. Tribes should be encouraged to exercise their sovereignty by developing land use and negotiation ordinances through established processes, which may include seeking the comments of energy companies. Such ordinances could include:
 - Application and document requirements for energy company submission to tribal officials
 - Formation of a tribal negotiation committee that recommends final right of way deals to the Tribal Council and designation of points of contacts.
 - Application fees which are reasonable but allow the tribe to hire necessary experts for the negotiation.
 - Valuation methodologies or standards to be used or considered by the tribe
 - Term and tenure rules established by the tribe
 - Trespass rules and charges
 - Lists of tribally retained rights when easements are granted
 - Easement forms with terms and conditions
 - Interconnection rules and obligations
 - Notices requirements for entrance onto the reservation
 - Bonding requirements for new construction or for maintenance or operational damages.
 - Environmental standards and requirements
 - Renewal requirements
 - Facilities removal requirements
 - Other procedural measures
 - Allottee protections

- D. The Departments of Energy and Interior should sponsor training for tribes, government staff, and energy companies for cooperative tribal right of way negotiations, which could educate all parties to the laws, history, cultures, requirements, and obligations of each of the parties.
- E. Encourage tribal and energy company discussions for the improvement of relationships between companies and tribes and the possibilities for partnerships.
- F. New policies and procedures to protect the rights of allottees should be instituted by both the federal government and by tribes.
- G. Indian employment in energy and land based fields should be encouraged through federal, tribal and industry programs.

Thank you for this opportunity to provide these comments. Please direct any questions to Margaret Schaff, at 303-443-0182.

Sincerely,

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